IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

: O R D E R :

Union of India and ors. Vs. M/s.Maheshwari Builders & anr.

(S.B. CIVIL WRIT PETITION NO.183/2005)

DATE OF ORDER ::: APRIL 19, 2005

P R E S E N T

HON'BLE MR. JUSTICE PRAKASH TATIA

Mr. Ravi Bhansali, for the petitioner.

Mr. Dinesh Mehta, for the respondent no.1.

BY THE COURT :

REPORTABLE

Heard learned counsel for the parties.

The facts in brief are that there is a work contract between the respondent no.1 and petitioner for construction of MD Accommodation (Quarters) for which contract agreement C.E./BTZ-12/90-91 was executed between the parties. Some dispute arose between the parties and ultimately, the respondent no.1 had to move an application under Section 11 of Arbitration and Conciliation Act, 1996 (for short 'the Act') before this Court which was registered as Arbitration Application NO.28/2004. This Court vide order dated

27.5.2004 appointed Hon'ble Justice Shri D.N. Joshi (Retd.) as sole arbitrator. However, while appointing Arbitrator, it was specifically observed that the objections with regard to appointment of arbitrator or the validity of reference to the arbitrator or the maintainability of the arbitration proceedings may be raised before the arbitrator but since the conditions requisite for invoking the powers under Section 11 has been satisfied, therefore, this Court appointed arbitrator.

The petitioner not satisfied with the order dated 27.5.2004 submitted an application for recalling the same. That application (SB Civil Misc. Application No.57/2004) was decided by the learned Designated Judge of this Court vide order dated 27.8.2004 by observing that the objection as to the authority to act as an arbitrator shall be raised before the Arbitrator under Section 11 and it is to be decided by the arbitrator. After obtaining this order, the petitioner submitted preliminary objections before the arbitrator, copy of which is placed as Annex.7. The arbitrator, after considering the interim order passed by Hon'ble Supreme Court in SLP No.1380/2003 rejected the petitioner's objection about the authority to act as arbitrator, therefore, the petitioner has preferred this writ petition challenging the order of arbitrator dated 16.10.2004 and the order dated 27.10.2004 passed by District Judge under the Act of 1996.

According to learned counsel for the petitioner,

exactly identical controversy was before the Delhi High Court in the case of UOI & Anr. vs. M/s. J.R.C. Grid Engineers P. Ltd. (CW No.4444/2002) and the Delhi High Court vide order dated 26.7.2002 rejected the contention which was raised by UOI in that case and this objection raised by the petitioner before the Arbitrator. However, the Hon'ble Supreme Court in SLP stayed the order dated 26.7.2002 of Delhi High Court.

According to learned counsel for the petitioner, as per Clause 70 of the agreement, the arbitrator could have been appointed only an Engineer Officer and none else can be appointed arbitrator.

The relevant portion of Clause 70 of the arbitration agreement reads as under :-

> "70. Arbitration :- All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding shall after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an Engineer Officer to be appointed by the authority mentioned in the tender documents."

According to learned counsel for the petitioner as per Section 11(8)(a) of the Act of 1996, the arbitrator can be appointed who is qualified to be appointed and for that purpose, due regard is required to be given to the qualifications required of arbitrator and as provided in

agreement of the parties.

In view of the above, according to learned counsel for the petitioner, the arbitrator committed error of law by wrong interpretation of clause 70 of the arbitration agreement and further committed error of law in interpreting Section 11(8)(a) of the Act of 1996.

According to learned counsel for the respondent no.1, all objections about competence of the arbiter tribunal and about its jurisdiction can be raised before the arbitrator and that has been raised by the petitioner after the orders passed by the learned designated judge of this Court dated 27.5.2004 and 27.8.2004.

According to learned counsel for the respondent no.1, in view of the mandatory provisions of sub-section 5 of Section 16, the arbiter tribunal since rejected the objection of the petitioner, therefore, is under an obligation to proceed with the arbitration proceedings and is under an obligation to pass the award. It is also submitted that sub-section 6 of Section 16 specifically provides that a party aggrieved by such an arbitral award (passed after rejecting the objection about competence and jurisdiction of the tribunal) may take a ground to challenge the award by filing appeal under Section 34. This provision specifically has been enacted to include the objection about the jurisdiction and competence of the arbiter tribunal as a ground to be taken in appeal.

Therefore, looking to the entire aim and object of the Act of 1996, due regard is required to be given to Sub-sections 5 and 6 of Section 16 and, therefore, this Court should not interfere in the order passed by the arbitrator and there appears to be no reason for any deviation from adopting the procedure as provided under the Act of 1996 in a matter where arbitration agreement is not in dispute but dispute has been raised only with regard to competence of the arbitrator.

I have considered the rival submissions and perused the order of Delhi High Court dated 26.7.2002.

The Delhi High Court following the decision of Supreme Court delivered in the case of Konkan Railway Corporation Ltd. & anr. vs. Rani Construction Pvt. Ltd. reported in (2002) 2 SCC 404, held as under :-

> “A perusal of this provision shows that Chief Justice or the designated authority was only required to give due regard to the qualifications required of the arbitrator provided in the agreement of the parties and to other considerations for appointment of an independent and impartial arbitrator. The spirit behind this was to ensure appointment of an independent and impartial arbitrator by also taking into consideration qualifications held by a person in terms of the agreement and other relevant factors. Once this premise was accepted mere agreement of

parties to appoint a specially qualified Arbitrator does not mean that no other person even if he possessed inherent element of impartiality or independence coupled with long experience for adjudicating wide range of subjects involving complex facts and questions of law could not be appointed. Moreover, once the party forfeits the right to appoint the arbitrator, it should be left to the wisdom and discretion of the court to decide on the suitability of the arbitrator to ensure fairness of award."

and, thereafter, rejected the objection of UOI.

The operation and effect of the aforesaid order of Delhi High Court has been stayed by the Hon'ble Supreme Court vide interim order dated 1.2.2003 and according to learned counsel for the parties, the matter is still pending decision before the Hon'ble Supreme Court.

The question is the stage, time and forum where the order passed by the Arbitrator of rejection of objections raised about competence and jurisdiction of Arbiter Tribunal can be raised or appropriate to be raised.

There appears to be force in the submission of learned counsel for the respondent that when sub-section (5) specifically provides that if the arbiter tribunal takes a decision rejecting the plea, then he is required to continue with the arbitral proceedings and make an arbitral

award. There was no necessity of specific inclusion of sub-section 5 of Section 16 in the Act of 1996 if the intention of legislature was to make order subject matter of appeal during arbitration proceedings. Sub-section 6 also provides that the order passed under sub-section 5 can be challenged in appeal against the award. Without there being sub-section 5 or even sub-section 6, that order could have been challenged by the aggrieved party but the specific provision has been enacted, therefore, due regard is required to be given to these proceedings and it is desirable to avoid the in-between challenges to the orders of the arbitrator.

Apart from it, this Court is also of the opinion even if other view is possible then the view taken by the learned Arbitrator on point of law, it cannot be a ground to interfere in the impugned order which is appealable after final award.

In view of the above discussion, I do not find any reason to interfere in the orders of the arbitrator at this stage when the parties have already submitted their claim and counter before the arbitrator and the arbitrator will decide the dispute itself expeditiously and the order can be challenged by the petitioner in appeal.

However, it may be observed that in certain cases, this Court may not refuse to interfere in the orders which are appealable but looking to the entire scheme of the Act of

1996 and particularly sub-sections 5 and 6 of Section 16 of the Act of 1996 and looking to the facts of this case, this court is not inclined to entertain this writ petition.

Accordingly, this writ petition having no force, is hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya